IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

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**No. 76-906**

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UNITED AIR LINES, INC., *Petitioner,*

v.

HARRIS S. MCMANN, *Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

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April 8, 1977

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### INTEREST OF THE AMICUS [1]

The Chamber of Commerce of the United States of America (hereinafter "the Chamber") is a federation consisting of a membership of over 3,600 state and local chambers of commerce and professional and trade associations and a direct business membership in excess of 60,100. It is the largest association of business and professional organizations in the United States.

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[1] Consents of the parties to the filing of this brief have been obtained, and letters reflecting such consents are on file in the Office of the Clerk.

In order to represent its members' views on questions vitally important to their interests and to render such assistance as it can to this Court's deliberations, the Chamber has frequently participated as *amicus curiae* in a wide range of significant fair employment matters before this Court.[2]

The issue in this case, whether employees may be retired involuntarily pursuant to bona fide retirement plans, is of major interest to the Chamber's membership. The amount of money invested by the Chamber's members in pension plans and retirement systems is enormous. The apparent effect of the decision below is to outlaw involuntary retirements prior to age 65, even in cases where substantial pension benefits are provided. This result would adversely affect many of the Chamber's members whose plans contain provisions authorizing or directing such pre-age 65 retirements. Moreover, that decision would deny all employers the option to provide for involuntary retirement below 65 years, however substantial the benefits received by the employees.

These issues were also of great importance to the Chamber's members in 1967 when Congress was considering the legislation which is interpreted by the court below. As a result, the Chamber testified before both the Senate and House subcommittees.[3] The Chamber and others expressed their concern to both subcommittees for the potential impact this legislation could have on the operation of employee benefit plans. As a result, Congress explicitly provided that age-related terms, including involuntary retirement provisions, in pension, retirement, health, and insurance plans would not be invalidated by the statute.

[2] *E.g., Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975); *Geduldig* v. *Aiello,* 417 U.S. 484 (1974); *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974); *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973); *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971).

[3] Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare, 90th Cong., 1st Sess. 105-44 (1967) ("Senate Hearings"); Hearings on H.R. 3651, H.R. 3768 and H.R. 4221 Before the General Subcomm. on Labor of the House Comm. on Education & Labor, 90th Cong., 1st Sess. 60-76 (1967) ("House Hearings").



For these reasons, the Chamber filed an *amicus* brief urging this Court to grant *certiorari* in the instant case, and now submits this brief in support of petitioner's contention that the decision below should be reversed.

## QUESTION PRESENTED

Whether the court below erred in holding that, absent an independent economic or business purpose, the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* (1970) (hereinafter "the ADEA" or "the Act"), prohibits involuntary retirement of employees prior to age 65, even where substantial retirement benefits are provided and notwithstanding the terms of Section 4(f)(2) of the Act, 29 U.S.C. § 623 (f)(2) (1970).

## STATEMENT OF THE CASE

The respondent, an employee of petitioner, United Air Lines, Inc., was terminated when he reached age 60 under an employee retirement plan which required all covered employees to retire at that age. Respondent filed an action claiming that his forced retirement violated the ADEA. The district court granted summary

judgment for the petitioner because it considered the petitioner's action to be authorized under Section 4(f)(2) of the ADEA, which states that "[i]t shall not be unlawful for an employer . . . to observe . . . any bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of [the Act]." 29 U.S.C. § 623(f)(2) (1970) (hereinafter "Section 4(f)(2)").

On appeal, the Fourth Circuit reversed the district court.[4] Though conceding that the United plan was "bona fide in the sense that it exists and pays benefits,"[5] the court of appeals rejected the district court's conclusion that the plan was not a subterfuge. It held that the Section 4(f)(2) exemption is available only if the employer can prove that there is no evasion of the *purposes* of the Act, that one of the principal purposes of the Act was to prohibit arbitrary age discrimination, and, therefore, that a mandatory early retirement provision "must have some economic or business purpose" independent of age if it is not to be considered a subterfuge.[6]

## INTRODUCTION AND SUMMARY

The court below is alone in concluding that the ADEA generally prohibits involuntary retirements before age 65 pursuant to a pension program. All other federal courts which have considered the question have reached directly contrary results: the Third Circuit in *Zinger* v. *Blanchette*, 14 Fair Empl. Prac. Cas. 497 (1977); the Fifth Circuit in *Brennan* v. *Taft Broadcasting Co.*, 500 F.2d 212 (1974); the Second Circuit in *de Loraine* v. *MEBA Pension Trust*, 499 F.2d 49 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974); and the district courts in *Steiner* v. *National League of Professional Baseball Clubs*, 377 F. Supp. 945 (C.D. Cal. 1974), *aff'd without opinion*, No. 74-2604 (9th Cir. Oct. 15, 1975); *Dunlop* v. *Hawaiian Telephone Co.*, 415 F. Supp. 330 (D. Hawaii 1976), *appeal docketed sub nom. Usery* v. *Hawaiian Telephone Co.*, No. 76-2874 (9th Cir. Aug. 26, 1976) and *Dunlop* v. *General Telephone Co. of California*, 13 Fair Empl. Prac. Cas. 1210 (C.D. Cal. 1976), *appeal docketed sub nom. Usery* v. *General Telephone Co. of California*, No. 76-2371 (9th Cir. June 25, 1976). Each of these decisions held that an employee benefit plan providing involuntary retirement before age 65 was lawful by virtue of the Section 4(f)(2) exemption.

[4] McMann v. United Air Lines, Inc., 542 F.2d 217 (4th Cir. 1976).

[5] *Id.* at 219.

[6] *Id.* at 221.



The courts in *Zinger* and *Hawaiian Telephone*, like the court below, held that whether a plan was adopted before or after the enactment of the ADEA was immaterial to the availability of the Section 4(f)(2) defense. In *Taft Broadcasting* the Fifth Circuit had held that the fact the profit sharing plan at issue had been adopted prior to the passage of the ADEA conclusively established that the plan was not a subterfuge to evade the purposes of the Act.[7]

The Chamber agrees with the Fourth Circuit, the Third Circuit, and the *Hawaiian Telephone* district court that Section 4(f)(2) should not be construed as

[7] 500 F.2d at 215. The Second Circuit in *de Loraine* relied both on the fact that a pension trust was adopted before the ADEA and that it "pays substantial benefits to a broad class of workers" in concluding that "the trust itself is certainly not a subterfuge to evade the purposes of the statute." 499 F.2d at 50.

treating plans adopted prior to the Act differently from those adopted afterwards.[8] It submits, however, that the proper standard for determining whether a plan is a subterfuge within the meaning of Section 4(f)(2) is that adopted by the Third Circuit in *Zinger* and by the district court in *Hawaiian Telephone* and not that adopted by the Fourth Circuit in this case. In both *Zinger* and *Hawaiian Telephone* the courts rejected the conclusion reached by the Fourth Circuit below and held that involuntary retirements before age 65, whether mandatory or at the employer's option, are lawful under the ADEA where they provide substantial benefits to the retired employees.

The most persuasive analysis of the present question is that contained in the Third Circuit's *Zinger* decision. There the court of appeals refused to follow the Fourth Circuit's interpretation of the ADEA. Its refusal was based on a thorough consideration of (1) the terms of the Act itself, (2) the pertinent legislative history, and (3) the contemporaneous interpretations of the ADEA by the Secretary of Labor. For the same

[8] The ADEA's legislative history puts to rest the notion that the fortuity of the date when a retirement plan was established controls as to its lawfulness under Section 4(f)(2). Both the House and Senate Reports unequivocally state that Section 4(f)(2) applies to "both *new* and *existing* employee benefit plans, and to both the *establishment* and *maintenance* of such plans." H.R. Rep. No. 805, 90th Cong., 1st Sess. 4 (1967); S.Rep. No. 723, 90th Cong., 1st Sess. 4 (1967) (emphasis added). Both the court below, 542 F.2d at 221, and the Third Circuit in *Zinger*, 14 Fair Empl. Prac. Cas. at 499, correctly viewed this explanation as clearly protecting both pre- and post-Act plans that otherwise came within the language of Section 4(f)(2). Moreover, the later enactment of the Employment Retirement Income Security Act ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829 (1974), which recognizes "normal" retirement ages before 65, further indicates that post-ADEA plans may benefit from the exception. *See* pp. 21-22, *infra*.



reasons found dispositive by the Third Circuit in *Zinger*, the Chamber submits that the decision below should be reversed.

## ARGUMENT

### I. THE DECISION BELOW DISTORTS THE PLAIN MEANING OF THE ADEA

#### A. The Act Permits Involuntary Retirement Prior to Age 65 Under a Bona Fide Retirement Plan

The ADEA's basic mandate is the protection of workers between the ages of 40 and 65 from arbitrary age discrimination in employment. 29 U.S.C. §§ 621 (b), 631. To that end, Section 4(a) of the Act declares it unlawful to discharge, fail to hire, or otherwise discriminate against an individual because of his age. 29 U.S.C. § 623(a). The Act, however, is not unlimited in its scope. In *Zinger* v. *Blanchette*, 14 Fair Empl. Prac. Cas. 497, 500 (3d. Cir. 1977) the Third Circuit, while noting the express prohibition against age discrimination in discharge, recognized: "[N]o statutory provision explicitly prohibits early retirement." Moreover, the only two provisions of the statute which refer to retirement would be rendered meaningless by the interpretation adopted by the court below.

First, Section 4(f)(2) provides:

> It shall not be unlawful for an employer . . . to observe . . . any bona fide employee benefit plan such as a retirement . . . plan which is not a subterfuge to evade the purpose of this [Act], except that no such employee benefit plan shall excuse the failure to hire any individual. . . .

29 U.S.C. § 623(f)(2).

This language is unambiguous in exempting involuntary early retirement under a benefit plan which is "bona fide" and not a "subterfuge." All parties to this litigation agree that United's plan is bona fide within the meaning of Section 4(f)(2).[9] The court below, however, found that, despite its bona fide character, the plan was a "subterfuge to evade the purposes of the Act" because United had shown no "economic or business purpose other than arbitrary age discrimination."[10]

The obvious and compelling response to the Fourth Circuit's position is that the Act does not require, either by Section 4(f)(2) or by any other provision, that a separate economic or business justification be demonstrated in order for a retirement plan to come within the exemption.[11] Indeed, apart from retirement programs, Sections 4(f)(1) and (3) separately exempt adverse action taken against members of the protected age group for economic or business reasons. Section 4(f)(1) explicitly permits age-related actions, including outright discharge without retirement benefits, when age is a "bona fide occupational qualification" or when there are "reasonable factors other than age" motivating the decision. Section 4(f)(3) similarly permits discharge or disciplinary action against an older worker for "good cause." Thus, these

[9] 542 F.2d at 219.

[10] 542 F.2d at 221.

[11] In fact, the court below implicitly acknowledged that "economic justification" could be demonstrated only under extraordinary circumstances. It observed that often it is financially advantageous for an employer to *postpone* employees' retirement under a retirement plan, since a later retirement age brings with it shorter life expectancies of retirees and pre-retirement mortality that decreases the total pay-out required. 542 F.2d at 222 and n.8.



exemptions allow discharge, without the necessity to pay retirement benefits, where the employer can establish the "economic or business purpose" required by the court below. The additional exemption in Section 4(f)(2) has—as its plain words state—a different purpose: to allow involuntary early retirement, under a plan providing benefits, without regard to any showing of business purpose.[12]

The only other provision of the Act which refers to retirement is Section 5, 29 U.S.C. § 624, which directs the Secretary of Labor to study

> institutional and other arrangements giving rise to involuntary retirement, and to report his findings and any appropriate legislative recommendations to the President and the Congress.[13]

If, as the opinion of the court below suggests, the ADEA outlaws all programs providing for involuntary retirement before age 65,[14] the enactment of Section 5 would have imposed a futile responsibility on the Secretary of Labor. The Secretary would have been obligated to make a study concerning an employment practice which Congress would have already prohibited. It is preposterous to suggest that Congress would have declared adherence to involuntary early retirement plans unlawful, and, at the same time,

[12] Section 4(f)(2) also permits employers to consider the age of newly hired workers in the protected age group in determining their ability to participate in employee benefit programs. *See* pp. 15-16, *infra*.

[13] Despite this clear directive, no such report has been made in the ten years since the enactment of the ADEA. *Zinger* v. *Blanchette*, 14 Fair Empl. Prac. Cas. 497, 500 (3d Cir. 1977).

[14] This was the characterization given the decision below by the Third Circuit in *Zinger*, 14 Fair Empl. Prac. Cas. at 500.

required study and legislative recommendations on how best to deal with the existence of such plans.[15]

As elementary rules of statutory construction, sections of a statute should normally be read in a manner that gives each separate provision independent significance,[16] and a statute clear on its face can be interpreted without resort to legislative history.[17] The exemption in Section 4(f)(2) and the instructions to the Secretary in Section 5 are superfluous only under the tortured reading given the Act by the court below. If the ADEA is read as Congress wrote it, it is clear that the ADEA permits involuntary retirement prior to age 65 under a plan that provides substantial pension benefits.

### B. Section 4(f)(2) Assigns the Burden of Proving that a Plan is a Subterfuge to the Plaintiff

The court below also ignored the plain meaning of the statute in its allocation of the burden of proof on

[15] The Third Circuit's recent opinion interpreting Section 4(f)(2) rightly concluded that Section 5 was included in the ADEA to permit the Secretary to propose an amendment to Congress dealing with the area of involuntary early retirement. Zinger v. Blanchette, 14 Fair Empl. Prac. Cas. 497, 503 (3d Cir. 1977). As the court in *Zinger* observed, the presence of Section 5 evidences Congress's concern with the subject and its decision to "await further data before deciding what, if any, further action is warranted." 14 Fair. Empl. Prac. Cas. at 503.

[16] United States v. Menasche, 348 U.S. 528, 538-39 (1955); Market Co. v. Hoffman, 101 U.S. 112, 115-16 (1879). *See also* Walker Mfg. Co. v. Industrial Comm., 27 Wis.2d 669, 135 N.W.2d 307 (1965) (similar state age discrimination statute construed to give each exemption independent meaning).

[17] United States v. American Trucking Ass'ns, 310 U.S. 534, 542-43 (1940); Caminetti v. United States, 242 U.S. 470, 485, 490 (1917); Brennan v. Taft Broadcasting Co., 500 F.2d 212, 217 (5th Cir. 1974).



the question of whether a pension plan is a subterfuge. The Fourth Circuit held that, in order for involuntary retirement prior to age 65 to be considered authorized by Section 4(f)(2), "*an employer must demonstrate* that . . . [its] plan is *not being maintained* as a subterfuge to evade the Act . . . ."[18]

Section 4(f)(2) has separate positive and negative elements, requiring first that the action in question be under a bona fide employee benefit plan, and then that the plan not be a subterfuge to evade the purposes of the Act. Since no party can prove a negative, the Chamber submits that the language of Section 4(f)(2) must be construed to limit the defendant's burden to showing that its action was in accordance with an employee benefit plan that is bona fide, *i.e.* one which actually exists and which pays benefits.[19] Such a showing would establish entitlement to the Section 4(f)(2) defense unless the plaintiff could affirmatively demonstrate that the plan, although bona fide, is a subterfuge which results in a violation of the Act. As the Third Circuit suggests in ***Zinger,*** a plaintiff could make such a showing in those cases where the benefits provided are so insubstantial that the alleged "early retirement" is in effect a prohibited discharge.

In comparable situations under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* (1970), this Court has repeatedly held that the burden of proof to show that an asserted defense is a "subterfuge" or "pretext"[20] for employ-

[18] 542 F.2d at 221 (emphasis added).

[19] *See* the decision below, 542 F.2d at 219. *Cf.* Brennan v. Taft, Broadcasting Co., 500 F.2d 212, 217 (5th Cir. 1974).

[20] The Court's recent opinion in General Electric Co. v. Gilbert,

ment discrimination is properly allocated to the plaintiff.[21] The Chamber submits that the same allocation of the burden of proof is appropriate under the ADEA.

## II. THE DECISION BELOW IGNORES THE LEGISLATIVE HISTORY OF THE ADEA, WHICH EVIDENCES A CLEAR CONGRESSIONAL INTENT TO ALLOW INVOLUNTARY EARLY RETIREMENT UNDER A PLAN PAYING SUBSTANTIAL BENEFITS

Contrary to the view of the court below, the legislative history of the ADEA supports rather than contradicts the plain meaning of the Act. In enacting the ADEA, it was Congress's primary concern to promote the employment opportunities of older workers. How-

97 S.Ct. 401 (1976), makes clear that in employment discrimination cases the words "subterfuge" and "pretext" are synonymous.

[21] For example, in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Court described the order of proof where an employer sought to utilize the exemption in Section 703(h) to defend its use of a personnel test which had a discriminatory effect on minority applicants. That exemption applies to actions based upon the results of a professionally developed ability test, provided that such test or action based thereon "is not designed, intended or used to discriminate because of race. . . ." 42 U.S.C. § 2000e-2(h) (1970). In the Court's view, employers have the burden of establishing through professional validation studies whether their employment tests are job-related. 422 U.S. at 430-31. However, if an employer meets this burden, "it remains to the complaining party to show that other tests . . . without a similarly undesirable racial effect would also serve the employer's legitimate interest. . . . Such a showing would be evidence that the employer was using its tests merely as a "pretext" for discrimination. *Id.* at 425. *See also* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), where the Court also placed the burden on the complaining party to show that the employer's justification for a challenged practice was a pretext for discrimination; that case was cited as authority for the above quoted statements in *Albemarle Paper*.



ever, as the court of appeals in *Zinger* v. *Blanchette* noted, Congress "continued to regard retirement plans favorably"[22] and made every effort to minimize the effect of the new Act on pension programs. Thus, Congress included Section 4(f)(2) expressly to exempt age-related provisions in employee benefit plans. The view of the court below that the legislative history of the Act supports a contrary conclusion ignores the dominant thrust of the legislative record and conflicts with the considered judgment of every other court that has reviewed the legislative history of Section 4(f)(2).[23]

President Johnson's January 23, 1967 message to Congress on "Older Americans," in which he urged passage of a law barring arbitrary age discrimination, specifically recommended that such a law "provide an exception where . . . [an] employee is separated under a regular retirement system."[24] Thus, Section 4(f)(2) in the Administration's original bill stated: "It shall not be unlawful for an employer . . . to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act. . . ."[25] The

[22] 14 Fair Empl. Prac. Cas. at 500.

[23] *See* Zinger v. Blanchette, 14 Fair Empl. Prac. Cas. 497, 500 (3d Cir. 1977); Dunlop v. Hawaiian Telephone Co., 415 F.Supp. 330 n. 1 (D. Hawaii 1976), *appeal docketed sub nom.* Usery v. Hawaiian Telephone Co., No. 76-2874 (9th Cir. Aug. 26, 1976); Dunlop v. General Telephone Co. of Cal., 13 Fair Empl. Prac. Cas. 1210, 1212 (C.D. Cal. 1976), *appeal docketed sub nom.* Usery v. General Telephone Co. of Cal., No. 76-2371 (9th Cir. June 25, 1976).

[24] 113 Cong. Rec. 1087, 1089-90 (1967).

[25] S. 830, 90th Cong., 1st Sess. § 4(f)(2)(1967).

meaning of that section was plainly that involuntary retirement under a retirement plan normally would not be considered illegal age-based discrimination. Secretary of Labor Wirtz, responding to an inquiry during the Senate hearings on the bill, explained how the section would affect private pension and insurance plans: "[T]he effect of . . . Section 4(f)(2) . . . is to protect the application of almost all plans which I know anything about. . . . *It is intended to protect retirement plans.*" [26]

The subsequent legislative history confirms that this original purpose of Section 4(f)(2) was reflected in the final enactment. The final version of Section 4(f)(2) is the result of an amendment to the Administration bill proposed by Senator Javits. This amendment served several purposes, but each was concerned with expanding or clarifying the Section 4(f)(2) exemption for involuntary retirement, not with eliminating it.

First, Senator Javits recognized that the Administration bill's original language—"involuntary separation under a retirement plan" "[met] only part of the problem." [27] He proposed that the section be expanded in two ways to accomplish better the Administration's

[26] Senate Hearings at 53 (emphasis added). Secretary Wirtz acknowledged in his opening remarks that the exemptions of Section 4(f) were "obviously broad" and further observed that what Section 4(a), the Act's prohibition section, did was to "extend to individuals *in situations not covered by* collective bargaining agreements or established *retirement policies*, a degree of protection—against discrimination on the basis of age—very much like that which has evolved in enlightened private experiences and practices." Senate Hearings at 39, 43 (emphasis added).

[27] 113 Cong. Rec. 7076 (1967) (statement of Sen. Javits).



purpose of permitting the continuation of legitimate employee benefit plans affecting older workers. His proposal substituted the phrase "observe the terms of a bona fide . . . retirement plan" for the phrase "involuntary separation" in order to make clear that the bill would also condone "flexibility in the amount of pension benefits payable to older workers." [28] While the statute was designed to increase opportunities for older workers to enter (or re-enter) the work force, this change in the language of Section 4(f)(2) acknowledged the potentially ruinous effects the law would have on employers if they were required to permit all employees to participate in benefit plans without regard to length of service.[29] Senator Javits was especially concerned that these cost considerations would have the effect of discouraging the employment of older workers.[30]

The Javits amendment also inserted additional language expanding Section 4(f)(2) to exempt not only retirement plans, but all bona fide employee benefit plans and seniority systems. This allayed employers' concerns that numerous age-related provisions in benefit plans might be inadvertently proscribed by the Act [31] and similar concerns with respect to seniority

[28] *Id.* Many such plans naturally key pension benefits to years of service or set a maximum age for entry into a plan because of the higher costs associated in coverage of older workers. *See also* Senate Hearings at 316-317 (Statement of American Telephone & Telegraph Co.); 321 (Statement of Association of American Railroads).

[29] Thus, although an employer may not refuse on the basis of age to hire individuals in the protected age group, he need not treat such recently-hired older workers equally with respect to benefits under a retirement plan.

[30] 113 Cong. Rec. 7076 (1967) (statement of Sen. Javits).

[31] *See* Senate Hearings at 106-07 (Statement of U.S. Chamber of

systems.[32] Finally, since the Javits amendment addressed what were recognized as legitimate employer concerns for the cost of employing older workers, the amendment also added a proviso in keeping with the basic purpose of the Act—"except that no such . . . employee benefit . . . plan shall excuse the failure to hire any individual."[33]

Javits's remarks introducing these modifications plainly indicate that their purpose was to expand and clarify the exemption contained in the Administration bill, not to narrow it.[34] The Senator commented: "[A] fairly broad exemption has been provided for bona fide retirement and seniority systems. As I previously noted, S. 830 contains only a limited exemption

Commerce); 257 (Statement of American Retail Federation); 279-80 (Statement of Charles Manning, pension plan consultant); 296-97 (Joint Statement of the American Life Convention, Health Insurance Association of America, and the Life Insurance Association of America); 315-17 (Statement of American Telephone & Telegraph Co.); 317-20 (Statement of Association of American Railroads); 323 (Statement of National Association of Manufacturers). *See also* House Hearings at 62-63 (Statement of U.S. Chamber of Commerce); 142 (Statement of American Retail Federation); 477-81 (Statement of Association of American Railroads); 483 (Statement of National Association of Manufacturers); 494-96 (Statement of American Telephone & Telegraph Co.); 499 (Joint Statement of American Life Convention, Health Insurance Association of America, and the Life Insurance Association of America).

[32] *See, e.g.,* Senate Hearings at 96 (Statement of AFL-CIO); 317-318 (Statement of Association of American Railroads). *See also* 113 Cong. Rec. 7076 (1967) (statement of Sen. Javits).

[33] 113 Cong. Rec. 7077 (1967).

[34] I have prepared and will introduce today a series of amendments to the Administration's bill, which I believe will meet those various problems, *while retaining the most desirable features of the Administration's bill,* and of S. 788. 113 Cong. Rec. 7076 (1967) (emphasis added).



for retirement systems and no exemption for seniority systems."[35]

In addition to clear statements of its author, statements by other principal parties to the legislative process show that the Javits amendment retained the exemption for involuntary retirement. Secretary Wirtz acknowledged that the Javits amendment, then pending in the Senate, did not signal a departure from the original meaning of the Administration bill. In testimony at the House hearings the Secretary was questioned with respect to Senator Javits's amendment in the Senate. He responded that the Department of Labor viewed the amendment to Section 4(f)(2) as "not going to the substance [of the Senate bill]" and as a change "going to clarification that would present no problem."[36]

Moreover, as the Third Circuit noted in *Zinger,*[37] representatives of organized labor testified in opposition to Section 4(f)(2), after Senator Javits had proposed his amendment, because "[i]nvoluntary retirement could be forced, regardless of the age of the employee, subject only to the limitation that the retirement policy or system in effect may not be merely a subterfuge to evade the Act."[38] They were, of course, unsuccessful in their attempt to persuade Congress

[35] 113 Cong. Rec. 7076 (1967) (statement of Sen. Javits).

[36] House Hearings at 40.

[37] 14 Fair Empl. Prac. Cas. at 501.

[38] Senate Hearings at 96 (Statement of Andrew J. Biemiller, Director, Department of Legislation, AFL-CIO). *See also* House Hearings at 413 (Statement of Kenneth Meiklejohn, Legislative Representative, AFL-CIO).

to eliminate the exemption for involuntary early retirement.

Observations made during final floor consideration of the law in both the House and the Senate confirm the views of the statute's principal advocates. The debates evidenced clear congressional recognition that the proposed legislation accomplished a balance by promoting employment opportunities for workers in the protected age category while protecting the operation of employee benefit plans.[39]

The court below, however, failed to recognize this balance in the statute. It discarded the original and basic purpose of Section 4(f)(2) in favor of its own view of the general objectives of the Act. The sole reference in the court's opinion to the legislative history is a citation to the House Report. From this the court below erroneously concluded that the entire Section 4(f)(2) exemption had the single purpose of permitting employers to consider age in determining benefits for newly-hired older workers.[40]

The Third Circuit's cogent analysis of the full legislative history in *Zinger* is far more persuasive.[41] The

[39] *See, e.g.*, 113 Cong. Rec. 31255 (1967) (remarks of Sen. Yarborough): "[T]his will not disrupt the bargained-for pension plan. . . ."

[40] 542 F.2d at 221. The House and Senate Reports' discussions of Section 4(f)(2) in the "Summary of Major Provisions" sections are virtually identical. *See* H.R. Rep. No. 805, 90th Cong., 1st Sess. 4 (1967); S. Rep. No. 723, 90th Cong., 1st Sess. 4 (1967). However, the Senate Report also includes a further statement by Sen. Javits: "[T]he bill has been improved by the adoption of language . . . exempting the observance of bona fide seniority systems and retirement, pension, or other employee benefit plans from its prohibitions." *Id.* at 14.

[41] Zinger v. Blanchette, 14 Fair Empl. Prac. Cas. 497, 500-502 (3d Cir. 1977).



court in *Zinger* recognized the tension in the Act between the protection of involuntary early retirement and the protection of the older worker's right to be employed. Nonetheless, it rightly concluded that Congress, faced with those competing considerations, chose to legislate differently with respect to hiring and discharge (without benefits) of older workers and retirement pursuant to a plan paying a reasonable pension. The Third Circuit thus observed:

> [T]he legislative history demonstrates that, while cognizant of the disruptive effect retirement may have on individuals, Congress continued to regard retirement plans favorably and chose therefore to legislate only with respect to discharge.[42]

For substantially the same reasons set out above, the court concluded that the original intent of the Administration bill was preserved in the Javits amendment and the final enactment.[43] Moreover, it recognized that Section 4(f)(2) must be interpreted in a manner that gives a reasonable meaning to each of its parts, as Congress plainly intended.

For these reasons the Third Circuit held the "subterfuge" language in Section 4(f)(2) must be given a sensible reading that is compatible with the retirement plan exemption. It concluded that a bona fide retirement plan which offers a "not unreasonable" pension is not a "subterfuge" to evade the statute's purposes.[44] Involuntary retirement without benefits, on the other hand, would be tantamount to a discharge

[42] *Id.* at 500.

[43] *Id.* at 501-502.

[44] *Id.* at 504.

and would not fall within the exemption in Section 4(f)(2). This analysis correctly gives meaning to each portion of Section 4(f)(2) and achieves the balance Congress clearly intended in the statute.[45]

The Third Circuit's statutory analysis is further supported by subsequent congressional action expressly approving involuntary retirement of certain federal employees prior to age 65.[46] As this Court rec-

[45] The Third Circuit's reasoning is supported by other federal court decisions interpreting Section 4(f)(2). In Dunlop v. Hawaiian Telephone Co., 415 F. Supp. 330, 332 (D. Hawaii 1976), *appeal docketed sub nom.* Usery v. Hawaiian Telephone Co., No. 76-2874 (9th Cir. Aug. 26, 1976), the court rejected the Secretary of Labor's challenge to a plan permitting involuntary retirement, interpreting "subterfuge" to refer "to involuntary retirement of a plan member on the basis of age *only if the retirement benefits are not sufficient.*" (Emphasis added.) The court explained:

> Such a reading of the word "subterfuge" is necessary to avoid interpreting § 4(f)(2) as meaningless. . . . The section makes more sense if the phrase is read as contemplating the act of terminating an employee (on the basis of age pursuant to a plan) *without paying the employee substantial benefits.* The "subterfuge" involved is not the act of termination on the basis of age, but the failure to pay the employee sufficient retirement benefits following such a termination.

*Id.* at 332-333 (emphasis added).

Similarly the Second Circuit has held that the fact that a trust "[paid] substantial benefits to a broad class of workers" was a determinative factor in holding that it was not a "subterfuge." de Loraine v. MEBA Pension Trust, 499 F.2d 49, 50 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974).

[46] In 1968, Congress reaffirmed age 60 as the mandatory retirement age for Foreign Service Officers. 22 U.S.C. §§ 930(a), 1229(e) (1970). In Bradley v. Kissinger, 418 F. Supp. 64, 70 (D.D.C. 1976), the court found that system to be "clearly a bona fide system or plan within the meaning of the ADEA." Pre-age 65 involuntary retirement is also authorized for certain CIA employees, Pub. L. No. 88-643, 78 Stat. 1043 (1964); Army Reserve officers 10 U.S.C. §§ 3843-44; certain regular Army officers, 10 U.S.C.



ognized in *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973), Congress should not be presumed to have declared unlawful under the ADEA practices *it* has perpetuated with respect to federal employees.[47]

In addition, at approximately the time the ADEA was enacted by Congress, the same congressional committees were considering legislation to regulate pension programs.[48] This legislation only recently emerged from Congress as the Employment Retirement Income Security Act ("ERISA"), Pub. L. 93-406, 88 Stat. 829 (1974). ERISA contains many age-related standards and specifically defines "normal" retirement age as the *earlier* of age 65 or the age provided in the pension plan.[49] This definition is critical to ERISA, since benefits are payable at the earlier of age 65 or normal

§§ 3883-86, 3916, 3921-23; and regular Coast Guard officers, 14 U.S.C. § 293.

[47] In *Espinoza* the Court rejected an EEOC guideline which equated discrimination on the basis of citizenship with discrimination based on national origin, which is prohibited by Title VII. The Court relied in part on the fact that Congress had enacted statutes since Title VII which barred aliens from government service, in spite of Executive Orders banning discrimination on the basis of national origin in federal employment. The Court stated: "[W]e cannot conclude Congress would at once continue the practice of requiring citizenship as a condition of federal employment and, at the same time, prevent private employers from doing likewise." 414 U.S. at 91.

[48] *See, e.g.*, Pension and Welfare Plans, Hearings on S. 3421, S. 1024, S. 1103, and S. 1255 Before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare, 90th Cong., 2d Sess. 271-272 (1968). S. 1024 and S. 1103 both were introduced in the previous Session and were pending at the time the ADEA was passed. 113 Cong. Rec. 3922, 4647 (1967).

[49] Section 3(24), 29 U.S.C. § 1002(24).

retirement,[50] and Congress was concerned that early retirement not be used to improperly accelerate funding to avoid taxation.[51] Clearly, if the same congressional committees which considered ERISA had intended to generally outlaw involuntary retirement before age 65 in the ADEA, as the court below concluded, the authorization of an earlier involuntary retirement date in ERISA would be meaningless.

In sum, the legislative history of the ADEA, supported by subsequent congressional action, provides conclusive evidence that Congress intended Section 4(f)(2) to protect involuntary early retirement with a pension. The ruling below emasculates the Section 4(f)(2) exemption and is contradicted by the legislative record and by soundly reasoned opinions of other courts that have concluded that the payment of substantial benefits under a early retirement plan prevents a finding of unlawful age discrimination.

### III. THE DECISION BELOW ERRONEOUSLY REJECTS CONTEMPORANEOUS ADMINISTRATIVE REGULATIONS AND OPINIONS AND FOLLOWS THE POSITION TAKEN BY THE SECRETARY OF LABOR IN HIS AMICUS BRIEF TO THE COURT BELOW

The court below summarily rejected the contemporaneous administrative pronouncements of the official charged with the responsibility of administering the Act, still in effect today, and accepted instead the advocative position taken by the Secretary in his *amicus brief* in this case. It held that the contemporaneous in-

[50] Section 206(a)(1), 29 U.S.C. § 1056(a)(1).

[51] *Cf.* Rev. Rul. 71-147, 1971-1 C.B. 116.



terpretations of the Act "[have] no significance for our decision" because "[a]s evidenced by the Secretary's *amicus curiae* brief and argument, *he has now concluded that the statement in the regulations is erroneous.*"[52] In so doing, the court of appeals acted in direct contradiction to applicable decisions of this Court.

Within a year of the enactment of the ADEA, the Department of Labor issued interpretive regulations which made clear that the Act permits involuntary retirement prior to age 65. Indeed, Section 860.110 of these regulations is entitled "Involuntary retirement before age 65." After quoting Section 4(f)(2)'s authorization for employers to "observe the terms . . . of any bona fide employee benefit plan," this Section further states: "Thus, the Act authorizes involuntary retirement irrespective of age, provided that such retirement [meets the Section 4(f)(2) requirements]."[53] Moreover, a 1969 amendment by the Secretary to Section 860.110 states that "[the Section 4(f)(2)] exception does not apply to the involuntary retirement before 65 of employees who are not participants in the employer's retirement or pension program." This additional paragraph further noted that Section 5 of the

[52] 542 F.2d at 219 n. 4 (emphasis added). *See also id.* at 222 n. 6, where the lower court rejected the conclusion of the court in Dunlop v. Hawaiian Telephone Co., 415 F. Supp. 330 (D. Hawaii 1976), *appeal docketed sub nom.* Usery v. Hawaiian Telephone Co., No. 76-2874 (9th Cir. Aug. 26, 1976), with the following comment: "Apparently, the *Dunlop* court did not have the benefit of the Secretary's *revised* position. Accordingly, to the extent that *Dunlop* relied on the regulation, its authority is weakened." (Emphasis added.)

[53] 29 C.F.R. § 860.110, published originally at 33 Fed. Reg. 12227-28 (1968).

ADEA "directs the Secretary of Labor to undertake an appropriate study of . . . involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to Congress."[54] The propriety of involuntary retirement before age 65 was further confirmed by several published opinions of the Department's Wage-Hour Administrator[55] issued shortly after the enactment of the ADEA.[56]

The succeeding portion of the regulations addresses the second purpose of Section 4(f)(2) under the heading "Cost and benefits under employee benefit plans." 29 C.F.R. § 860.120(a). After again setting forth the authorization of Section 4(f)(2) for employers to

[54] 29 C.F.R. § 860.110(b), published originally at 34 Fed. Reg. 322 (1969).

[55] The Secretary of Labor has delegated to the Wage-Hour Administrator the authority to issue interpretations of the ADEA, 36 Fed. Reg. 8753-54, 8756 (1971). Moreover, employers who act in good faith reliance on these interpretations have an absolute defense to liability under the ADEA by virtue of Section 10 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 259, even if the interpretation is later withdrawn or judicially set aside. *See* 29 U.S.C. § 626(e).

[56] ADEA Opinion, Wage-Hour Administrator Clarence T. Lundquist, Aug. 14, 1968; ADEA Opinion, Wage-Hour Administrator Lundquist, Sept. 6, 1968; ADEA Opinion, Wage-Hour Administrator Lundquist, Sept. 13, 1968.

On November 15, 1968, Administrator Lundquist issued another Opinion, again stating that the Act did not prohibit compulsory retirement at age 62. The Opinion continued:

> This exception [§ 4(f)(2)] does not apply, however, to the involuntary retirement before age 65 of employees who are not participants in the employer's pension programs. *Thus, for example, in the case of employees who are participants in your client's pension plan, such employees may be retired involuntarily before age 65, but employees who are not participants in the plan may not be so retired.* (emphasis added).



"observe the terms . . . of any bona fide employee benefit plan," this regulation states the additional objective of the exemption in permitting employers to consider age in determining the benefits to be accorded newly hired workers in the protected age group. These sections from the interpretive regulations demonstrate the Secretary's contemporaneous recognition that Congress, in adopting Section 4(f)(2), intended to permit both involuntary retirement before age 65 and differentiation in benefits for newly-hired, older workers.

The Fourth Circuit's disregard for the Labor Department's official interpretations is totally inconsistent with the analysis which this Court has applied in similar circumstances. In *General Electric Co.* v. *Gilbert*, 97 S.Ct. 401 (1976), this Court recently rejected an interpretative guideline of an agency which was inconsistent with the position taken in earlier regulations:

> We have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency. *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 858-859, n. 25 (1975); *Espinoza* v. *Farah Mfg. Co., supra*, 414 U.S. at 92-96. In short, while we do not wholly discount the weight to be given the 1972 guideline, it does not receive high marks when judged by the standards enunciated in *Skidmore, supra. Id.* at 411.

The *Skidmore* standards are the ones which the court below should have applied in weighing the Department of Labor's published regulations against the "revised" position advocated in the Secretary's brief. Under those standards the weight to be given an ad-

ministrative interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[57]

Measured against those standards it is clear that the Secretary's advocative position must not be allowed to override his contemporaneous interpretations of Section 4(f)(2) which reflect the legislative history. Compared to the agency's attempted change of position in *Gilbert,* the circumstances here are even stronger, since the Secretary has never withdrawn or amended the published interpretations to reflect any change of position. The Secretary as advocate should not be permitted to circumvent Congress's intention and to ignore his own interpretation as administrator in this cavalier and unorthodox manner. As the Third Circuit aptly observed in *Zinger:*

> [T]he Secretary's latter day position is not only contrary to that taken by his predecessor contemporaneously with the consideration and passage of the Act, but also to the views of the Congressional committees which declined that proposal when it was forthrightly presented to them. Thus, rather than proposing an amendment to Congress, as Congress had instructed [in Section 5 of the Act], the Secretary seeks to change the Act by court decision or administrative fiat.[58]

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[57] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). *See also* United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975), where the Court rejected an argument of the Securities and Exchange Commission in an *amicus* brief which "flatly contradicts what appears to be a rather careful statement of the Commission's views in a recent release." *Id.* at 858 n. 25.

[58] 14 Fair Empl. Prac. Cas. at 503. *See also id.* at 502.



## CONCLUSION

The foregoing discussion demonstrates that the decision of the Fourth Circuit below ignores the plain language of the Act, its legislative history, and the contemporaneous interpretations of the Department of Labor. The decision would read Section 4(f)(2) out of the Act and would make Section 5 utterly meaningless. As the Third Circuit recognized in *Zinger,* arguments for this result go to the merits of the exemption. As such, they are "properly matters of legislative concern and evaluation," and "miss the mark when urged upon a court in support of a statutory interpretation."[59]

For these reasons the Chamber submits that the judgment of the court of appeals below should be reversed.

Respectfully submitted,

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April 8, 1977

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[59] 14 Fair Empl. Prac. Cas. at 503.